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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-6770

SYLVESTER GAVIN,

Petitioner,

v

CHARLES E. ANDERSON, Warden,

Respondent.

ORIGINAL COPY

ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM IN RESPONSE

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Stephen F. Schuesler
Assistant Attorney General
525 West Ottawa Street
763 Law Building
Lansing, Michigan 48913
(517) 373-1124

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QUESTION PRESENTED

Whether Petitioner's Notice of Appeal from the April 30, 1979 judgment of the District Court was timely filed with the clerk of the District Court as required by Rule 4(a) of the Federal Rules of Appellate Procedure and 28 USC § 2107.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Sixth Circuit dated April 3, 1980 and May 21, 1980 are as set forth in Petitioner's Appendix A.

JURISDICTION

Jurisdiction is as stated in the petition.

COURT RULE AND STATUTORY PROVISIONS

Prior to its amendment effective August 1, 1979, Rule 4(a) of the Federal Rules of Appellate Procedure provided in pertinent part as follows:

> "In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; . . .
>
> " * * * .
>
> "Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. . . ."

28 USC § 2107 provides in pertinent part as follows:

"Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

" * * * .

"The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree."

STATEMENT OF THE CASE

This is a habeas corpus action which originated on December 8, 1978 in the United States District Court for the Eastern District of Michigan. The docket entries in the District Court (attachment A) indicate that the District Court's judgment dismissing the petition for habeas corpus was entered on April 30, 1979 and that Petitioner's Notice of Appeal from that judgment was filed with the clerk of the court on August 3, 1979. Following the docketing of Petitioner's appeal in the United States Court of Appeals for the Sixth Circuit and the submission by both parties of briefs on the merits, the Court of Appeals sua sponte issued its order on April 3, 1980 that Petitioner show cause why his appeal should not be dismissed for lack of jurisdiction. Since no response to the Court's show cause order was requested of the Respondent, none was given. On April 29, 1980, Respondent received a copy of Petitioner's reply to the Court of Appeals order to show cause. The reply asserted essentially the same claim advanced herein, i.e., that Petitioner's Notice of Appeal was timely mailed directly to the District Court judge rather than to the District Court clerk. No objection was filed by Respondent to Petitioner's contention. The Court of Appeals order dismissing Petitioner's appeal for lack of jurisdiction entered May 21, 1980 and this petition followed on June 16, 1980.

In his petition to this Court, Petitioner claims that the Notice of Appeal was forwarded by a fellow prisoner "directly to the attention of the district judge instead of the clerk as provided by the Federal Rules of Appellate Procedure, rule 4, on or about May 19, 1979 . . ." (Petition, page 2). Petitioner has attached the affidavit of inmate Jerry VanDiver (Petitioner's Appendix B) in support of his claim. Petitioner also claims that the Michigan Attorney General was provided with a copy of the Notice of Appeal.

Respondent's only knowledge of when the Notice of Appeal was received by the District Court comes from the docket entries which are attached. Also, the letter dated August 14, 1980 from United States District Judge Cook to Sixth Circuit Court of Appeals clerk John Hehman (Petitioner's Appendix D) indicates that the District Court never received Petitioner's letter of May 19, 1979.

However, Respondent Warden did receive on May 21, 1979 via institutional mail copies (attachment B) of Petitioner's Notice of Appeal, Affidavit in Support of Notice of Appeal, and of Petitioner's transmittal letter addressed to Judge Cook.

Petitioner further maintains that on May 27, 1979, prior to the expiration of the time for appeal, he forwarded a letter to Judge Cook modifying the question to be presented on appeal (Petition, page 2). The docket entries of the District Court do not reflect that this letter was ever received by the court. However, on or about June 11, 1980, the Michigan Attorney General did receive via interdepartmental mail a copy of a letter (attachment C) dated May 27, 1980 to Judge Cook Modifying the issue to be presented on appeal.

CONCLUSION

The Court of Appeals was, of course, limited in its determinations by the record before it. The docket entries in the District Court indicate that the 30-day time limit under Rule 4(a) and 28 USC § 2107 for filing a timely notice of appeal was not met. That time limit is applicable to habeas corpus proceedings, is mandatory and jurisdictional. Browder v Director, Illinois Department of Corrections, 434 US 257; 54 L Ed 2d 521; 98 S Ct 556 (1978). However, because of the receipt on May 21 and June 11, 1979 by Respondent of Petitioner's mailings as indicated, Respondent would not have opposed (and does not now oppose) a remand to the district court for correction or modification of the record. Rule 10(e), Fed R App P.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Stephen F. Schuesler
Assistant Attorney General
525 West Ottawa Street
763 Law Building
Lansing, Michigan 48913
(517) 373-1124

Dated: August 28, 1980

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PLAINTIFFS | DEFENDANTS

4-30-79

(1) Sylvester Gavin (2)

(1) Charles D. Anderson
Warden of State Prison of
Southern Michigan at Jackson
Michigan (2)

CAUSE

PRISONER PETITIONS - Habeas Corpus

ATTORNEYS

In Pro Per
#91669
Box #
Jackson, MI 49204

Frank J.Kelley by John P.
Mack (P28407) Crim.Div.
Law Bldg. 525 W.Ottawa
Lansing,MI. 48913
(517)373-1120

1978

Dec. 8 1. Petition for Writ of Habeas Corpus. DD 12/1X/78

" 20 2. ORDER requiring filing of responsive pleading on or before Feb. 13/79. DD 12/20/78 Konives, M.

1979

Feb.2, 3. Correspondence between plft & writ clerk. DD.2/2/79

" 14, 4. Appearance of Frank Kelley on behalf of deft with notice. DD.2/14/79

" 14, 5. Deft's notice of state trial transcript(transcript not attache. DD.2/14/79

" 14, 6. Deft's motion to dismiss & alternative motion for summary judgement with affidavit & B/A. DD.2/14/79

" 14, 7. Proof of service re #4-6. DD.2/14/79

CHECK FIRE AWAY	FILING FEES PAID DATE	RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARDS CARD	DATE MAILED

ATTACHMENT "A"

	NR.	PROCEEDINGS
5	8	Brief in opposition to Motion to Dismiss & Alternative Motion for Summary Judgment, with proof of service. DD 3/6/79.
30	9.	Memorandum Opinion & Order denying plft's petition for writ of habeas corpus. DD.5/2/79 Cook,J.
30,	10.	JUDGMENT: entered on behalf of deft & plft's petition for writ of habeas corpus is dismissed. DD.5/2/79 Cook,J.
3	11.	Pltf's notice of appeal with aff. DD 8/3/79
3	12.	Letter to atty. re: appeal. DD8/3/79
3	13.	Proof of service re: appeal to John P. Mack 525 W. Ottawa Lansing MI 48913 and CCA. DD 8/3/79.
30	14.	Cert. of service re notice of appeal. DD 8/3/79

MICH. DEPT. of CORR.

MEMORANDUM

TO: Keith Roberts
Attorney General's Office DATE: 5/22/79

FROM: Warden's Office - STate Prison of So. Mich.

SUBJECT: Sylvester Gavin vs Charles E. Anderson,
Civil Action 78-73163

The attached documents were ceived in the Warden's Office by institutional mail on 5/21/79.

JDP:ao

cc: Tom Patten

ATTORNEY GENERAL
CORRECTIONS DIVISION
MAY 23 1979
Assigned

CSD-106A
REV. 1'72

ATTACHMENT "B"

The Honorable Judge Cooke
United States District Court
Eastern District of Michigan S.D.
Federal Building
Detroit, Michigan 48226

Re: Sylvester Gavin vs Charles Anderson
Civil No. 78-73163

Dear Judge Cooke:

Enclosed please find Notice of Appeals Motion to Proceed In forma Pauperis, Affidavit in support of Motion to proceed In forma pauperis, and Certificate of Service, for your consideration and approval for the issuance of Certificate of Probable cause.

Thank you in advance for your anticipated courtesy and cooperation in this respect.

Respectfully

Sylvester Gavin
91669
P.O. Box E
Jackson, Michigan 49204

JVD/ sq
cc. Frank Kelly
Attorney General
file.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SYLVESTER GAVIN

Petitioner

- vs -

CA # 73-73163

CHARLES E. ANDERSON, WARDEN OF
STATE PRISON OF SOUTHERN MICHIGAN
AT JACKSON, MICHIGAN

Respondent.

NOTICE OF APPEAL

AFFIDAVIT IN SUPPORT OF NOTICE OF APPEAL

Sylvester Gavin
Serial NO. 91669
P. O. Box E
Jackson, Michigan 49204

in Pro Se

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SYLVESTER GAVIN

Petitioner

- vs - CA # 78-73163

CHARLES E. ANDERSON, WARDEN OF
STATE PRISON OF SOUTHERN MICHIGAN
AT JACKSON, MICHIGAN

Respondent.

NOTICE OF APPEAL

Notice is HEREBY given that Sylvester Gavin, Petitioner the above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit, from the final judgment entered in this action on the 22nd day of May 1979.

Respectfully submitted

S/ Sylvester Gavin

Sylvester Gavin
Serial NO. 91669
P. O. Box [illegible]
Jackson, Michigan 49204

in Pro Se

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SYLVESTER GAVIN

Petitioner

- vs - CA # 78-73163

CHARLES E. ANDERSON, WARDEN OF STATE PRISON OF SOUTHERN MICHIGAN AT JACKSON, MICHIGAN

Respondent.

STATE OF MICHIGAN)
COUNTY OF JACKSON) ss

AFFIDAVIT IN SUPPORT OF NOTICE OF APPEAL

I, Sylvester Gavin, being first duly sworn, deposes and says that I, am the Petitioner in the above entitled cause; that in support of my notice of appeal and to pay fees and costs and to the security therefore, I state that I am unable to pay the costs of said proceedings and give security therefore; that I believe I am entitled to redress; that the issues which I desire to present on appeal are the following:

THE DISTRICT COURT COMMITTED ERROR WHEN IT ERRONEOUSLY STATED IN DENYING PETITIONER'S PETITION FOR A WRIT OF HABEAS CORPUS THAT PEOPLE V TILL, 80 MICH APP 16 (1977) CONTROLS THIS STATE OF MICHIGAN LAW, WHERE ANOTHER MICHIGAN CASE, THAT OF PEOPLE V RICE, 80 MICH PP 172, IS TO THE CONTRARY OF PEOPLE V TILL, SUPRA, AND SUPPORTS THE GRANTING OF PETITIONER'S PETITION FOR A WRIT OF HABEAS CORPUS.

I, Sylvester Davin, understands, that a false statement or answer to any questions in this affidavit will subject me to a penalties for perjury.

Respectfully submitted

/s/ Sylvester Davin

Sylvester Davin
Serial #. 81.6.
P. O. Box E
Jackson, Michigan 492 4

In Pro Se

Subscribed and sworn to before me this date: May 19 1979

Jerry VanDiver #141366

Dennice McCullum 127521

Eddie Lee 132141
ATTEST:

The above named Petitioner is confined in segregation which is segregated detention for the reason, for refusing to move to another prison facility, and inmates confined in segregation does not have ready access to courts, e.g., notary public service.

STATE OF MICHIGAN

USE IT AGAIN

DEPARTMENT OR DIVISION	PERSON	DEPARTMENT OR DIVISION	PERSON
[redacted]	[redacted]		
MR. CHARLES E. ANDERSON			
Regional Administrator			
WARDEN SPSM			

To file

ATTORNEY GENERAL
CORRECTIONS DIVISION
JUN 11 1979
Assigned to Abood 6/13/79

Honorable Julian A Cook
United States District Court
Eastern District of Michigan
Federal Bldg
Detroit, Michigan 48226

Re Garrison vs Anderson, Civil No 78-73163.

Dear Judge Cook

At the time of filing of my Notice of Appeal I was in the detention block (I'm still in the det. block). The detention poses its peculiar problems in filing any pleadings to the courts. Therefore, a pleading cannot be drafted the notice of appeal is not completely satisfied with the issues as framed by me. Therefore, at this time I wish to modify the issues to be raised:

The district court committed error in denying petitioner's petition for writ of habeas corpus, in holding that Davis v. Tinsley, 119 Mich App 10 (1982), limits the scope of Michigan's statute of the issue on which instructions where requested, M.C.L. 750.316 (1931), excluded the same defenses to the charge.

The district court committed error in denying petitioner's petition for writ of habeas corpus stating that petitioner did not show he was prejudiced by the trial court's failure to instruct on malice a necessary element of felony murder.

The district court committed error in concluding that petitioner's failure to object to his jury instructions precluded judicial review and relief.

ATTACHMENT "C"

Hopefully, the foregoing modification will serve you to issue a certificate of probable cause expeditiously.

Thank you in advance for your hoped for courtesy and consideration in this regard.

Sincerely,

[redacted]
Secial No. 91669
P.O. Box E
Jackson, Al. 36701

cc: Attorney General
file

P. O. BOX E
JACKSON, MICHIGAN 49204

LANSING Pony -

DEPT. OF THE
ATTORNEY GENERAL
JUN 1 1979
Assigned to Roberts